Supreme Court, U.S.
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(1)

No. 06-337

In The Supreme Court of the United States

CARL E. KNOCHELMANN, JR.,
Petitioner,

v.

MARY E. BJELLAND, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Kentucky Supreme Court

PETITION FOR A WRIT OF CERTIORARI
with Appendix

* Carl E. Knochelmann, Jr.
ATTORNEY AT LAW
3032 Belle Meade Lane
Edgewood, KY 41017

(859) 982-0097

* *Counsel of Record*
Pro Se Counsel

September, 2006

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED FOR REVIEW

1. Is the Due Process Clause of the Fourteenth Amendment that guarantees the fundamental right of parents to make decisions concerning the care, custody, and control of their children violated when a child support statute awards presumptive amounts that are greater than necessary to provide for the basic needs of the child?

2. Does the state's involvement in redistribution of money from one parent's household to the other parent based on an arbitrary standard that purports to maintain the standard of living of the child had the parties stayed together, violate the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution?

3. Does the Kentucky child support statute create unconstitutional classes of people?

4. Does the Kentucky child support statute violate the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution, 18 U.S.C. § 651 et seq and 45 CFR § 302.55, 302.56 because it relies on judicial discretion to rebut the presumptive child support awards rather than by stated standards?

5. Does the Kentucky child support statute violate the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution, 18 U.S.C. § 651 et seq and 45 CFR § 302.55, 302.56 because Kentucky's presumptive child support schedule is not based on the cost of raising children in Kentucky?

6. Does the Kentucky child support statute violate the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution, 18 U.S.C. § 651 et seq and 45 CFR § 302.55, 302.56 because Kentucky's presumptive child support schedule fails to provide for the support for the children when they are in the household of the payor?

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinion Below 1

Basis for Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

A. Background 3

Argument Supporting Allowance of the Writ 5

A. The Child Support process in Kentucky violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States and Federal Law 6

B. The state Court has decided to ignore an important question of federal law that has not been and should be settled by the Supreme Court 14

Conclusion 16

Appendix 18

KENTUCKY SUPREME COURT:
Order Denying Discretionary Review,
filed 06/07/06 ..... A1 - A1

KENTUCKY COURT OF APPEALS:
Opinion,
filed 12/22/05 ..... B1 - B9

CAMPBELL COUNTY CIRCUIT COURT:
Order,
filed 09/19/03 ..... C1 - C3

Order,
filed 08/06/03 ..... D1 - D7

Domestic Commissioner's Report,
filed 04/29/03 ..... E1 - E24

Notice of Reservation,
filed 09/17/99 ..... F1 - F2

TABLE OF AUTHORITIES

CASES **PAGE**

Booher v. United States Postal Service,
843 F.2d 943 (6th Cir. 1988) 8

Clary v. Clary,
54 S.W.3d 568 (Ky. App. 2001) 6, 10

Connolly v. Taylor,
2 Pet 556 (1829) 14

Dawson v. Hamilton,
Ky., 314 S.W.2d 532 (1968) 8

Eisenstadt v. Baird,
405 U.S. 438, 92 S.Ct. 1029 (8) (1972) 9

Grupo Dataflux v. Atlas Global Group, L.P., et al,
124 S.Ct. 1920 (U.S. 2004) 14

Malone v. Commonwealth,
Ky., 30 S.W.3d 180 (2000) 13

Mollan v. Torrance,
9 Wheat 537 (1824) 14

Moylan v. Moylan,
384 NW 2d 859 at 866 (Minn., 1986) 10

Raikes v. Langford,
701 S.W. 2d 142, (Ky. App. 1985) 13

Rinaldi v. Yeager,
384 U.S. 305, 86 S.Ct. 1497 (1966) 8

Roberts v. Mooneyhan,
902 S.W. 2d 842 (Ky. App. 1995) 8

Roe v. Wade,
410 U.S. 113, 93 S.Ct. 705 at 726-28 (1973) 9

Troxel v. Granville,
530 U.S. 57, 120 S.Ct. 2054 (2000) 6, 9, 11, 16

Walters v. Bindner, et al,
435 S.W.2d 464 (Ky. App. 1968) 8

FEDERAL STATUTES

18 U.S.C. § 651 ..... 12, 16

28 U.S.C. § 1257 1

42 U.S.C. § 651 ..... 2, 4

42 U.S.C. § 667 ..... 2, 11

STATE STATUTES

KRS 403.212 ..... 4, 6, 7

KRS 403.211 11

KRS 403.270 9

KRS 405.020 9

KRS 600.020 9

FEDERAL REGULATIONS

45 CFR 302.55 ..... 3, 4, 12

45 CFR 302.56 12

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the Supreme Court of Kentucky, Petitioner, Carl E. Knochelmann Jr., respectfully prays that a Writ of Certiorari be issued to review the decision entered by the Kentucky Supreme Court (2006-SC-0178-D) dated June 7, 2006 denying discretionary review of the decision of the Kentucky Court of Appeals (2003-CA-00258, dated December 22, 2005.

OPINIONS BELOW

Petition for discretionary review by the Kentucky Supreme Court was denied June 7, 2006. (Order, Apx A1-A1). The decision of the Kentucky Court of Appeals (Opinion, Apx B1-B9) was ordered not to be published but is referenced as 2003-CA-00258-MR.

BASIS OF JURISDICTION

The judgment of the Kentucky Supreme Court was entered on the 7 day of June, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States reads in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution Amendment XIV.

42 U.S.C. § 651 et seq was established to create procedures with "the purpose of enforcing the support obligations owed by noncustodial parents to their children ... locating noncustodial parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children".

42 U.S.C. § 667 states in part that "there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case."

45 CFR 302.55, 302.56 define the requirements for state child support plans when it states in pertinent part "as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State", that "the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded" and that when establishing the guidelines "a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods".

STATEMENT OF THE CASE

A. BACKGROUND

This is a paternity case with a long history of litigation concerning the custody and support of the parties' minor son, Eric, who was born on June 27, 1997. The case commenced in July 1997 when the Respondent herein, Mary Bjelland, filed a Petition for Custody of Eric in the Campbell County Kentucky Circuit Court prior to the establishment of Petitioner as the father of Eric. Petitioner, Carl E.

Knochelmann Jr., filed a Motion to Dismiss the Petition for lack of subject matter jurisdiction at the time the case was filed which was subsequently ignored by the Kentucky Courts and the case proceeded.

The state case proceeded on two issues, the first issue of child custody, was decided in October 1999 with the parties being granted the joint custody of Eric. Petitioner was allocated 8 of every 14 days of the parenting responsibility for Eric (Domestic Commissioner's Report, Apx E2). No appeal has been advanced on this issue.

The other issue between the parties is the proper assignment of child support to be paid by either party. Respondent is the higher earning party yet Petitioner has been ordered by the trial court to make child support payments to Respondent despite Petitioner's greater allocation of parenting responsibilities. Early in this case, Petitioner recognized that there are Federal Constitutional issues in this case which resulted in his filing a Notice of Reservation of Federal Jurisdiction. (Notice of Reservation, Apx F1). Petitioner has argued in the trial Court that the Kentucky Child Support Statute, KRS 403.212, as applied by the trial court violated his due process and equal protection rights (B2) and failed to comply with 42 U.S.C. § 651 et seq and 45 CFR 302.55, 302.56. Petitioner had earnings in 1999 of $28,346.00 and Respondent had 1999 earnings of $36,382.00 (Domestic Commissioner's Report, Apx E3-E4), yet Petitioner is the party required to make child support

payments. The earnings of the parties has increased over time but Respondent has consistently been the higher wage earner. The child support issue in this case was further complicated when the Petitioner signed a sales contract in 1999 to sell a piece of real estate that he had owned since 1977. The closing on the real estate sale occurred in April 2000 and provided for payment of the proceeds in three annual payments. The Respondent convinced the trial Court that the long term capital gains on the real estate should be included in Petitioner's income for purposes of determining child support; even though, the trial Court refused to include a capital gain of Respondent when she moved and sold her house. The net result was that child support for Petitioner was retroactively increased which created an arrearage of nearly $15,000.00 that was assessed against the Petitioner with retroactive interest at 12%. Petitioner challenged the Court's authority to redistribute a portion of the proceeds of the sale of his real estate to Respondent and the Courts failure to award him child support due to his lower level of earnings.

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

A. The Child Support process in Kentucky violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States and Federal Law.

By granting Certiorari of this Petition, The Supreme Court of the United States will give guidance, clarification and rule of law as to the limit that a state can intervene into the parenting decisions relative to the amount of monetary support it can order one parent to give to another parent purportedly for the benefit of children.

In Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000), the Supreme Court held that a state should use the lease restrictive means to achieve any compelling state interest that might exist. The Kentucky child support statute, K.R.S. 403.212, incorporates an arbitrary standard (maintain the same standard of living for the child had the parties stayed together, Clary v. Clary, 54 S.W.3d 568 (Ky. App. 2001) in the establishment of its presumptive child support amounts. The statute is not based on the cost of raising children in Kentucky and fails to state any basis for rebuttal. Rebuttal of the presumptive amount is solely based on the discretion of the trial judge which flies in the face of the rule of law required by the Fourteenth Amendment of the Constitution of the United States.

The Kentucky child support statute, KRS 403.212, creates several unconstitutional classes of people. Children of cohabitating parents (married or unmarried) are treated differently from children of parents who are not living together (divorced or split up). Children from different relationships are treated differently. Pre-born and after born children are treated differently than the children of a current marriage or current relationship. Child support enforcement practices based on the Kentucky child support statute create unconstitutional classes of parents. Payors are treated differently than payees. There is no enforcement on payees while there is strict criminal enforcement on payors .

The Kentucky child support schedule allocates support between parents based on relative income without any consideration to tax benefits the child may give to either party. The payee is "presumed" to be contributing the amount allocated to them. However, there is no enforcement to verify payee's contribution. Payees can choose to neither work nor provide any income. The money that is purportedly provided by the payee for the children frequently is not being provided and not enforced equally by Kentucky. Additionally, the payee who has all of the money for the support of the child never is ordered to provide for the child when he/she are residing with the payor resulting in an artificially increased child support obligation for the payor.

Every person is entitled to equal treatment under the law. When similarly situated individuals are treated

differently without justification, it is a violation of equal protection. Roberts v. Mooneyhan, 902 S.W. 2d 842 (Ky. App. 1995); Booher v. United States Postal Service, 843 F.2d 943 (6th Cir. 1988). "One who has a liberty or property interest affected by such a law may assert an equal protection claim". Booher, supra. "The Equal Protection Clause of the Fourteenth Amendment requires "***that in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" Walters v. Bindner et al, 435 S.W.2d 464 (Ky. App. 1968) citing Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct. 1497 (1966). "Section 59 of the Kentucky Constitution requires that "***there must be a substantial reason why a particular law is made to operate upon a class of citizens and not generally upon all." Walters v. Bindner, et al, 435 S.W.2d 464 (Ky. App. 1968), *citing* Dawson v. Hamilton, Ky., 314 S.W.2d 532 (1968). In "order for a law to be general in its constitutional sense it must meet the following requirements: (1) It must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification." Walters v. Bindner, et al, 435 S.W.2d 464 (Ky. App. 1968). There is no justification for the different manner in which members of these classes are being treated in Kentucky.

The Due Process Clause of the Fourteenth Amendment guarantees the fundamental right of parents to make decisions concerning the care, custody, and control of

their children. The state does not have the right to interfere with the parenting decisions of the parents absent a showing of detriment to the child. Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000).

In Kentucky, the parents have the joint custody of their minor children at birth. KRS 405.020. Each parent shall be given equal consideration in the allocation of parenting time and responsibility for their children when the parents are not together. KRS 403.270 (2). The Kentucky abuse and neglect statute, KRS 600.020, defines when detriment to a child is sufficient for the state to intervene in the decisions of parents that are together. This standard should also be used to determine when Kentucky can intervene in the parenting decision for parents that are not together.

The right to privacy is fundamental to the parenting decisions of a parent. Fundamental in parenting decisions is how much and what money to allocate to their children. The right to privacy has been long recognized to apply to "family" concerns whether the family exists within the confines of marriage or not. Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (8) (1972), Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 at 726-28 (1973). By requiring the payor to pay a support amount in excess of that required to meet the child's basic needs, which is not necessarily the same amount as maintaining the standard of living, the Kentucky Guidelines impermissibly interfere with parental decisions regarding financial expenditures on children. Troxel v. Granville, 530

U.S. 57, 120 S.Ct. 2054 (2000) and 147 L. Ed. 2d 49 (U.S. 2000); Moylan v. Moylan, 384 NW 2d 859, 866 (Minn., 1986).

Kentucky uses the income shares model to generate its child support schedule. Clary v. Clary, 54 S.W.3d 568, (Ky. App. 2001). This model attempts to maintain the same standard of living for children after their parents have separated as they would have if the parents stayed together and is based on the national data from the Consumer Expenditure Survey conducted by the Bureau of Labor Statistics in the late 1980's. It is not based on data from the cost of raising children in Kentucky and has not been updated as required by Federal Law. The standard is flawed on its face for two reasons. First, the standard defies a logical explanation demonstrating how the standard of living can be maintain for two households with the same pot of money that there was when the parties lived together which obviously does not compute for paternity cases when the parties never lived together and have always maintained separate residences. The overall standard of living, measured by any means that can withstand mathematical scrutiny, would necessarily go down for everyone unless the standard of living for one party is further sacrificed to benefit the other party. On the other hand, if the parties never lived together, there is no before and after separation standard to compare, as in this case, the standard of living of the child would not be changed by the parties continued living apart. Secondly, the standard

is not based on the cost of raising children in Kentucky and it does not provide any logical method for rebuttal as required by 42 U.S.C. § 667.

The term "standard of living" relates to the amount of money to be spent on a child and is a right of the parents to determine, not the Commonwealth of Kentucky absent a showing of detriment to the child. Troxel, supra. Parents have the right to set spending patterns for their child and to allocate spending among their children as long as their decisions are not detrimental to the children. It has not been alleged by either parent that Eric has been deprived of his basic needs when he resides at either household.

The mathematical make up of the presumed child support amounts must be available for review or no reasoned rebuttal is possible. Nowhere are Kentucky's child support statute are the presumed child support amounts broken down so a party or a Court can make a reasonable rebuttal of the presumed amount, making the Kentucky child support statute unconstitutionally vague and over broad. In practice, Kentucky uses a one size fits all mentality and the courts simply assign the amount calculated from the schedule to one party regardless of the allocation of parenting time with the children. The provision in KRS 403.211 that states that the "Court may deviate form the guidelines where application would be unjust or inappropriate" is no standard of rebuttal at all. It leaves it up to the Court to contrive a standard which

varies widely throughout Kentucky. Such a power given to a Court violates due process and is unconstitutional.

The Kentucky Child Support Statute does not provide a method for allocating child support when the child is with both parents equally or how to decide who is the payor. Without a basis for accurately allocating support, due process is violated.

The Kentucky Child Support schedule sets child support based on the total incomes of the parents not the cost of raising children in Kentucky. The Kentucky Child Support schedule does not have a basis for rebutting child support that is determined by application of the child support schedule. 18 U.S.C. § 651 et seq, 45 CFR 302.55 and 45 CFR 302.56 mandate that any presumptive child support award be based on the cost of raising children and that any presumption be rebuttable "under criteria established by the state". The Kentucky Child Support statute does neither. The Kentucky Child Support statute is based on the concept that the children should maintain the same standard of living had the parents stayed together. There is no mention of the cost of raising children nor is there any rebutting possible since there are no standards for rebutting mentioned in the Kentucky Child Support statute. Additionally, there is no rebutting or procedure established when there is an equal allocation of parenting time/expenses for the children between the parents. Therefore, the Kentucky Child Support statute is not in conformance with the Federal law.

Appellee filed her verified petition for custody of a minor child on July 21, 1997. Paternity was not established until March 9, 1998 by an Agreed Order entered by the Campbell County Kentucky District Court. On August 22, 1997, the Appellant filed a Response pointing out that paternity had not been established until after the filing of the Petition for Custody in the Campbell County Kentucky Circuit Court and a Motion to Dismiss the action claiming that the Court did not have jurisdiction in the case because it did not have jurisdiction at the time of filing of the case.

Where a court has subject matter and personal jurisdiction, it is properly said to have jurisdiction over the case. Malone v. Commonwealth, Ky., 30 S.W.3d 180, 183 (2000). The Court did not have subject matter jurisdiction to determine paternity as a matter of law when this case was filed so it could not retroactively establish jurisdiction.

In a paternity case, a condition precedent to the Court's power to exercise its jurisdiction is that the identity of the parents be determined. When the Court does not have jurisdiction at the time of the filing of the action, the case is a nullity and void. The lack of jurisdiction renders a case "as if no Complaint (Petition) at all had been filed." Raikes v. Langford, 701 S.W. 2d 142, (Ky. App. 1985). In Raikes, at the time of filing of a Complaint in a wrongful death case, a stay was in effect in the U.S. Bankruptcy Court. The Court of Appeals in Raikes held that the action was filed in violation of the "automatic stay order, and that the action was therefore

void for lack of jurisdiction from its beginning and could not be retroactively validated thereafter" when the stay was lifted.

Appellee filed her Petition for Custody and Support when the Court had no jurisdiction and jurisdiction can not be revived by a later paternity determination in District Court. The case at bar is a nullity and void. Raikes, Supra., Grupo Dataflux v. Atlas Global Group, L.P., et al, 124 S.Ct. 1920 (U.S. 2004). "This time of filing rule is hornbook law taught to first-year law students in any basic course on federal procedure." Grupo Dataflux, supra; *citing* Mollan v. Torrance, 9 Wheat 537 (1824), Connolly v. Taylor, 2 Pet 556 (1829). In Grupo Dataflux, the Court, quoted Connolly as stating that "jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit". A Court does not have jurisdiction to establish child support or custody when paternity has not been established prior to the filing of the case. The jurisdiction of the Campbell County Kentucky Circuit Court to render as decision in this matter is in question.

B. The Kentucky Court has decided to ignore an important question of federal law that has not been and should be settled by the Supreme Court.

The question of the limit of state authority to intervene in the parenting decisions when determining child support is important to all children of Kentucky and of the Unites States.

Petitioner has searched and could not find any guidance from the Supreme Court in any case on the issues presented here. Interference with the rights and responsibilities of parents by government involve fundamental rights that should be decided by the highest Court in the land. Kentucky has a vague statute governing child support that has not been challenged. Other states have similar statutes governing the allocation of child support but Petitioner could not find any case in any other jurisdiction that examines the limit of state involvement. Child support seems to be a sacred cow for both the courts and politicians that is immune from scrutiny.

Kentucky and other states have instituted criminal sanctions for those payors who can not or do not make all of the ordered payments. In light of criminal sanctions being a possibility, it is imperative that a payor not have their liberty at risk because of a faulty child support statute that violates the Fourteenth Amendment and Federal Law. Payors can spend time in jail and tax payers have to bear the cost of prosecution and housing anyone jailed for non-payment of court ordered child support. The importance of the Supreme Court review of the faulty child support system in Kentucky can not be under estimated. The citizens of Kentucky and of the United States deserve a fair and Constitutional child support statute.

CONCLUSION

Federally mandated child support procedures are intended to ensure the best interest of the minor children of the United States. The Fourteenth Amendment of the Constitution of the United States protects parents from unwarranted interference in their decisions concerning the care, custody and control of their children. A compelling state interest must be shown before the state has authority to intervene in a parent's decisions. If state intervention is permitted then the state must use the least restrictive means to achieve its compelling state interest. Troxel, supra.

The Kentucky statute and many others around the United States fail to comply with these restrictions. Kentucky has an arbitrary child support statute that on its face fails to comply with Federal Law, 18 U.S.C. § 651 et seq. The Kentucky child support table is not based on the cost of raising children and there are no standards for rebutting the presumption of validity. Kentucky's child support table was created from flawed data on the expenditure patterns of intact families from large cities, not from Kentucky cost of raising children in Kentucky. Kentucky's method of rebuttal is the most repugnant of all, it lets each judge set his own standards without any rule of law.

The Kentucky child support statute creates unconstitutional classes of people who are treated differently. Children of intact families are overlooked while children of

separated families are subject to unconstitutional intrusion by the state. Payors are subject to criminal sanctions while payees can choose not to provide the presumed support for the child without any fear of criminal sanctions.

Kentucky tax payors are required to pay for criminal prosecutions for non-payment of child support when the Kentucky child support statute itself does not comply with the Federal Statute that generated its enactment. The time is right for the Supreme Court to review and to set standards of review for child support statutes that do not exceed the authority of the state to intervene into the parenting decisions concerning expenditures on children.

Carl E. Knochelmann Jr.
Pro se
3032 Belle Meade Lane
Edgewood, Ky. 41017
(859) 982-0097

APPENDIX

KENTUCKY SUPREME COURT:

Order Denying Discretionary Review,
filed 06/07/06 ..... A1 - A1

KENTUCKY COURT OF APPEALS:

Opinion,
filed 12/22/05 ..... B1 - B9

CAMPBELL COUNTY, KENTUCKY CIRCUIT COURT:

Order,
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Order,
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Domestic Commissioner's Report,
filed 04/29/03 ..... E1 - E24

Notice of Reservation,
filed 09/17/99 ..... F1 - F2

SUPREME COURT OF KENTUCKY

2006-SC-0178-D
(2003-CA-2258 & 2003-CA-2308)

CARL E. KNOCHELMANN, JR. **MOVANT**

V. **CAMPBELL CIRCUIT COURT**
NO. 1997-CI-0860

MARY E. BJELLAND, ET AL. **RESPONDENTS**

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED June 7, 2006.

/s/ Joseph E. Lambert
Chief Justice

FILED
June 7, 2006
Supreme Court
of Kentucky,
Clerk

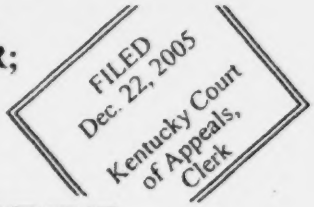
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NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2003-CA-002258-MR

CARL E. KNOCHELMANN, JR. APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 97-CI-00860



MARY E. BJELLAND, PETITIONER;
HON. BERNARD J. BLAU,
ATTORNEY FOR PETITIONER;
HON. JAMES W. MORGAN, JR.,
FORMER ATTORNEY FOR RESPONDENT;
AND HON. J. ROBERT JENNINGS,
CAMPBELL COUNTY DOMESTIC
RELATIONS COMMISSIONER APPELLEES

AND NO. 2003-CA-002308-MR

MARY E. BJELLAND, AND
BERNARD J. BLAU CROSS-APPELLANTS

CROSS-APPEAL FROM
CAMPBELL CIRCUIT COURT
v. HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 97-CI-00860

CARL KNOCHELMANN, JR. CROSS-APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

** ** ** **

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Karl Knochelmann appeals from an order of the Campbell Circuit Court determining the amount of child support, including arrearages, he must pay to Mary Bjelland for the support of their minor child and also refusing to require the child to attend parochial school as his father prefers. On appeal, Knochelmann challenges the trial court's subject matter jurisdiction, the constitutionality of Kentucky's child support statutes, the inclusion of proceeds from the sale of real estate in his income, the jurisdiction of the Domestic Relations Commissioner (DRC), the procedures followed by the trial court, and the refusal of the DRC to recuse himself due to an alleged conflict of interest. He also claims the existence of an agreement between the parties for Bjelland to accept nonmonetary support and the right to present a claim for fraudulent contraception. We find all of these issues thoroughly meritless. Bjelland cross-appeals alleging that the trial court improperly credited a tax intercept against

Knochelmann's child support arrearage. Due to the trial court's failure to make a factual finding as to which party received the proceeds of the intercept, we vacate this portion of the trial court's order. The remainder of the order is affirmed.

Bjelland and Knochelmann were never married, nor did they ever co-habitate. Their son was born June 27, 1997, and Bjelland filed a petition in circuit court the following month seeking custody and child support. In August, Knochelmann sought to have the case dismissed because paternity had not been determined. The district court entered an agreed order in March 1998 adjudging Knochelmann to be the natural father of Bjelland's child. The DRC held a hearing on the temporary child support in June 1998 and issued a report the following month recommending a finding that personal and subject matter jurisdiction existed. Both parties filed objections to the report; the trial court reviewed the record, conferred with the DRC, and overruled all objections.

The proceedings which followed are far too numerous to list in their entirety and culminated in the trial court's final order, dated August 6, 2003, which is the subject of this appeal. The trial court's order adopted the

DRC's findings of fact contained in the April 2003 report. Bjelland was granted the right to decide which school the child would attend. Knochelmann's objection, claiming that the DRC's function was unconstitutional, was overruled. Pursuant to Clary v. Clary, 54 S.W.3d 568 (Ky. App. 2001), the trial court included the income from the sale of property which Knochelmann had owned for some twenty years prior to the birth of his son in calculating his child support obligation. Knochelmann was ordered to pay child support of $281.71 per month from July 21, 1997 through June 29, 1999; $111.40 per month from June 29, 1999 through April 25, 2001; and $867.30 per month from April 25, 2001 through December 21, 2002. The trial court calculated Knochelmann's arrearage at $14,847.39, then subtracted prior payments plus the amount intercepted from his 2002 federal income tax refund and ordered him to pay Bjelland $9,632.29, plus 12% interest as of December 31, 2002. This appeal and cross-appeal followed.

Knochelmann argues that the Campbell Circuit Court did not have jurisdiction to determine custody and child support of his and Bjelland's child because Kentucky Revised Statute (KRS) 406.051 vests exclusive jurisdiction

to determine paternity in the district court. The statute actually reads as follows:

> **406.051 Remedies; District Court's concurrent jurisdiction for child custody and visitation in paternity cases.**
>
> (1) The District Court has jurisdiction of an action brought under this chapter and all remedies for the enforcement of judgments for expenses of pregnancy and confinement for a wife or for education, necessary support, or funeral expenses for children born out of wedlock. An appeal may be had to the Circuit Court if prosecuted within sixty (60) days from the date of judgment. The court has continuing jurisdiction to modify or revoke a judgment for future education. All remedies under the uniform reciprocal enforcement of support act are available for enforcement of duties of support under this chapter.
>
> (2) The District Court may exercise jurisdiction, concurrent with that of the Circuit Court, to determine matters of child custody and visitation in cases where paternity is established as set forth in this chapter. The District Court, in making these determinations, shall utilize the provisions of KRS Chapter 403 relating to child custody and visitation. The District Court may decline jurisdiction if it finds the circumstances of any case require a level of

proceedings more appropriate to the Circuit Court.

There is no mention of exclusive jurisdiction being vested in the district court. Moreover, this is irrelevant because Bjelland did not file a paternity action; rather she filed a petition for custody, pursuant to KRS 403. In addition, she filed a second action asking for temporary custody and child support. Knochelmann contends that Cann v. Howard, 850 S.W.2d 57 (Ky. App. 1993), divests the circuit court of jurisdiction to determine child custody and support when paternity has not been established. We strongly disagree with his interpretation of our holding in Cann, a case which involved interpreting the provisions of the Parental Kidnapping Protection Act and the Uniform Child Custody Jurisdiction Act, and which dealt not at all with establishing paternity between unmarried parents. Thus, Knochelmann fails to persuade us that the circuit court had no jurisdiction to determine custody and child support in the present case.

Next, Knochelmann claims that the trial court erred by including proceeds from the sale of real estate as income for the purpose of calculating his child support obligation. His income in 2000, 2001, and 2002 increased substantially

due to the sale of some real estate he owned and for which he received a payment of $211,000.00 in each of those years. The trial court adopted the ORC's finding that KRS 402.212(b) and our previous holding in Clary required these proceeds to be included as income for the purpose of calculating Knochelmann's child support obligation. In Clary, which also involved the sale of real estate, we addressed the argument that such income ought to be prorated over a period of twenty-eight years. We disagreed and held that "when a parent receives income from a nonrecurring event, the trial court should include that amount in the year received..." Clary at 574. Knochelmann argues that our decision in Clary misinterprets that statute and should be reversed. We disagree.

We find Knochelmann's remaining claims of error regarding the ORC, the procedures followed by the trial court, the constitutionality of Kentucky's child support laws, his claim regarding an agreement between the parties to allow him to furnish non-monetary support, and his demand to present a claim of fraudulent contraception without merit and decline to address them separately. The trial court's order is affirmed with respect to these issues.

We will, however, address the remaining issue which was raised in Bjelland's cross-appeal.

Bjelland asks us to reverse the trial court's order with regard to the amount of arrearage set. Initially, the trial court calculated Knochelmann's total child support owed to date as $26,253.13. The trial court then subtracted payments Knochelmann had already made totaling $11,405.74. In addition, the trial court credited Knochelmann with a payment of $5,215.00 through an income tax intercept which occurred in July 2003. Bjelland claims that, although the money was intercepted, Knochelmann succeeded in persuading the division of child support to refund the money to him and, thus, she never received this amount as child support. Knochelmann has not contested this issue; moreover, the trial court made no separate findings of fact in its order beyond the findings contained in the DRC's report. The DRC's report was dated April 2003 which was three months before the tax intercept occurred. Thus, at no time has there been a finding with regard to who received the proceeds of the tax intercept. Therefore, we vacate the portion of the trial court's order setting Knochelmann's arrearage and remand for the trial court to make a factual finding as to the ultimate

disposition of the $5,215.00 tax intercept and, if necessary, correct the calculation of Knochelmann's arrearage.

The order of the Campbell Circuit Court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

Lisa O. Bushelman
Florence, Kentucky

BRIEF FOR APPELLEES/CROSS-APPELLANTS:

Scott Troy Steffen
Cold Spring, Kentucky

CAMPELL CIRCUIT COURT

DIVISION NO. ONE

MARY BJELLAND,	)	
	)	
Petitioner,	)	**NO. 97-CI-860**
	)	
-vs-	)	**ORDER**
	)	
CARL KNOCHELMANN	)	
	)	
Respondent.	)	

FILED
Sep. 19, 2003
Campbell County, KY, Circuit Court, Clerk

This matter is before the Court upon a Motion to alter, amend or vacate, a Motion for findings, a Motion for a new trial, a Motion that the Petitioner and Respondent to be the only patties to be present at the court-ordered mediation by the Respondent. The Court reviewed the record, including the memoranda filed by the parties, held a hearing on the matter at its regular motion hour on September 5, 2003, considered all other matters and otherwise was advised sufficiently.

First, the Court's Order entered on August 6, 2003 confirming the report of the Domestic Commissioner filed on April 29, 2003, with the exceptions noted therein, impliedly overruled any other exceptions and/or objections

filed by either party and incorporated the findings of fact of the Domestic Commissioner.

Second, relative to the Respondent's allegation of error of the Court regarding Respondent's child support arrearage, the Court ordered that an arrearage be set at $9,632.39 plus 12% interest from December 31, 2002. Any further arrearage would be determined from that date hence after the calculation of the child support responsibility of the Respondent from January 1, 2003 until the present through mediation. Further, any other allegations of error on the part of the Court filed in the Respondent's memorandum of September 5, 2003 are inappropriate in time and substance for a Motion to alter, amend or vacate pursuant to the Civil Rules.

Accordingly;

IT IS ORDERED that Respondent's Motion to alter, amend or vacate is overruled.

Respondent's Motion for findings is overruled.

IT IS FURTHER ORDERED that Respondent's Motion for a new trial is overruled.

IT IS FURTHER ORDERED that Respondent's Motion for an Order indicating that the Petitioner and the

Respondent are the only parties to be present at the court-ordered mediation is sustained.

This Order is final and appealable, there being no just cause for delay.

/s/ William J. Wehr
WILLIAM J. WEHR, Judge

CC: Lisa Bushelman
Bernard Blau

CAMPBELL CIRCUIT COURT

DIVISION NO. ONE

MARY BJELLAND,	)	
	)	
Petitioner,	)	**NO. 97-CI-860**
	)	
-vs-	)	**ORDER**
	)	
CARL KNOCHELMANN	)	
	)	
Respondent.	)	

FILED
Aug. 6, 2003
Campbell County, KY, Circuit Court, Clerk

This matter is before the Court upon a Motion to confirm the report of the Domestic Commissioner filed on April 29, 2003 and Petitioner's Motions relative to tax exemption and school attendance for the parties' minor child. Both parties filed lengthy exceptions and objections to the Commissioner's report, to which the parties responded respectively. The Court reviewed the record in depth, held hearings on the Motion to confirm the report at the Court's regular motion hour on May 20, 2003 and July 22, 2003 and an oral argument was held on July 30, 2003 during which counsel for the parties, as well as the parties, were present. Further, the Court heard Petitioner's Motions relative to the tax exemption and school

attendance for the parties' minor child at the Court's regular motion hour on July 22, 2003 and also at the hearing on July 30, 2003. The Court considered all other matters and otherwise was advised sufficiently.

IT IS ORDERED as follows:

First, relative to the parties being held in contempt of court for various actions and/or inactions, since the parties have agreed to mediate the remaining issues with Ho. James Kruer, the recommendation for contempt for both parties shall be withdrawn.

Second, Petitioner's exception relative to the sharing of out of pocket medical expenses is sustained and Respondent shall be responsible for his proportionate share of out of pocket medical expenses

Third, pursuant to Troxel vs. Granvill, 530 US 57, (2000), which supports the parents' fundamental rights to decisions concerning their children, this Court designates to the Petitioner the responsibility of determining which school the parties' minor child should attend and, therefore, Respondent's objection relative to the child attending St. Pius School is overruled. The Court adopts the recommendation of the Domestic Commissioner founded in the best interest of Eric Knochelmann that he attend Moyer

Elementary School in Ft. Thomas, KY in the first grade and continue to attend school in the Ft. Thomas School District until further Order of this Court. There is testimony that this is the same school system that Eric's step-brother attends as well as testimony from the principal at Moyer Elementary.

Next, Respondent's objection relative to the right of first refusal shall be referred to mediation, the Court noting that this particular objection was not highlighted during the oral argument and the Court being of the opinion that mediation is a more appropriate means of resolution.

The Respondent's objection relative to the unconstitutionality of the Domestic Commissioner could not have been preserved at the Commissioner hearing. However, IT IS ORDERED that Respondent's objection is overruled due to the authority of the Chief Justice to allow for the continual use of domestic relations commissioners in this Circuit for a limited period of time during the transition to Family Court.

Further, IT IS ORDERED that Petitioner's exceptions and Respondent's objections relative to attorneys' fees are overruled.

Seventh, relative to an alleged ambiguity between an order entered on August 26, 1998 that included daycare expenses in the monthly child support payment and an order entered by the Court confirming Master Commissioner's report filed on October 5, 1999 ordering each party to pay their own daycare for the parties' minor child, the order entered on August 26, 1998 was entered after a hearing with the Domestic Commissioner which set child support at a specific amount which included daycare expenses after a hearing wherein testimony was received by the Domestic Commissioner relative to the parties' income and expenses. The Order confirming the Domestic Commissioner's report filed on October 5, 1999 ordering each party to pay their own daycare for the parties' minor child was entered after a hearing by the Domestic commissioner relative to parenting time of the parties' minor child. That order contained no child support calculation, recommendation or order of child support, since child support was not the subject of that hearing.

Further, the Court will note that all the previous orders of this Court were not temporary orders as argued by the Respondent. The Motions as filed by the parties were referred to the Domestic Commissioner who held a hearing

on the Motions, heard testimony, filed a report with the Court containing findings of fact, conclusions of law and recommendations to the Court. Those reports were noticed for the Court's motion hour and, in every instance, objections were filed by the parties pursuant to the Rules, which were reviewed and considered by the Court prior to the entry of the Court's order relative to those motions.

Also, pursuant to Clary vs. Clary, KY App, 54 SW3rd 568 (2001), KRS 403.210 all income shall be included for the purpose of establishing child support. While the Respondent argues that the capitol gains should be divided by the 25 years that Respondent owned the real estate, that is in direct contradiction to the case law and statute cited.

THEREFORE, IT IS ORDERED that from July 21, 1997 until June 29, 1999 Respondent's child support obligation is $281.71 a month. From June 29, 1999 until April 25, 2001, Respondent's child support obligation is $111.40 per month. Further, from April 25, 2001 until December 31, 2002, Respondent's child support obligation is $867.30 per month. For those periods of time, respectively, Respondent's child support obligation is $6,456.33, $2,450.80 and $17,346, for a total of $26,253.13.

According to the Child Support Office, as of December 31, 2002, the Respondent has paid $11,081.04, plus the $324.70 for a total of $11,405.74. Plus, on June 19, 2003, a $5,215, 2002 Federal tax intercept payment was received by the Child Support Office. Therefore, Respondent's child support arrearage is $14,847.39 minus the tax intercept payment of $5,215 for a total of $9,632.39 plus 12% interest as of December 31, 2002 and shall be paid within 60 days of the date of this Order.

Further, the record should reflect that the Domestic Commissioner's report and this Order is inclusive of all pending Motions filed by the parties which were considered by the Court, including Respondent's Motion for child support filed on March 17, 1999, Petitioner's Motion to increase child support filed on June 29, 1999, Petitioner's Motion for child support increase filed on April 25, 2001.

IT IS FURTHER ORDERED that Respondent's oral motion made at the hearing on July 30, 2003 for a reduction in child support is more appropriate for mediation since the parties have now submitted their income tax returns from 2002 and therefore, said issue is referred for mediation to Hon. James Kruer. Respondent shall continue to pay $111 per month for regular child support until child

support is set beginning January, 2003. Any arrearage shall be set after child support for 2003 is established through mediation.

FINALLY, IT IS ORDERED that all of the rest and remainder of the Domestic Commissioner's report filed April 19, 2003 be and the same is hereby confirmed, with the exceptions noted above, and shall be the Order and Judgment of this Court.

/s/ William J. Wehr
WILLIAM J. WEHR, Judge

CC: Lisa Bushelman
Bernard Blau

CAMPELL CIRCUIT COURT
DIVISION ONE
CASE NO. 97-CI-00860

FILED
Apr. 29, 2003
Campbell County,
KY, Circuit Court,
Clerk

IN RE: THE MARRIAGE OF

MARY BJELLAND

Petitioner

And

CARL KNOCHELMANN

Respondent

DOMESTIC COMMISSIONER'S REPORT

This matter came on for hearing before the Domestic Commissioner on August 20, 2002 pursuant to an Order of Reference with Notice given to all parties.

Petitioner was present and was represented by the Hon. Bernard Blau. Respondent was also present but was not represented by counsel.

This matter is before the Court for hearing of numerous motions filed by Petitioner and Respondent. Based upon the pleadings, exhibits and testimony offered herein, the Domestic Commissioner makes the following Report.

FINDINGS OF FACT

1. Pursuant to the Order entered by this Court on October 28, 1999, Petitioner and Respondent were awarded joint legal custody of Eric James Bjelland, born June 27, 1997. Eric was to reside with Respondent from, Wednesday morning at 8:00 A.M. until Friday at 5:30 P.M., and during the following week from Thursday at 8:00 A.M. through the weekend until Monday at 5:30 P.M. Petitioner would have custody of Eric at all other times during this two week period. Pursuant to the Order entered by this Court on August 26, 1998, Respondent was ordered to pay child support to Petitioner in the amount of $64.78 per week effective July 21, 1997.

2. From May 17, 1999 through May 14, 2002, Petitioner and Respondent have filed numerous motions. A hearing was finally scheduled for August 20, 2002 on these motions. A Notice of Hearing was mailed to Petitioner's attorney and to Respondent on July 11, 2002. At the hearing on August 22, 2002, Respondent made an oral motion for a continuance so that he may have an opportunity to obtain legal counsel. The Domestic Commissioner at that hearing overruled Respondent's

motion on the basis that Respondent had six weeks to obtain an attorney and had failed to do so.

3. On March 17, 1999, Respondent filed a motion requesting that Petitioner pay child support to him. On June 29, 1999, Petitioner filed her motion requesting an increase in child support, and filed that motion again on April 25, 2001. A hearing was held with these parties on September 7, 1999, but the parties did not present evidenced regarding income and therefore no order regarding child support was made at that time. At the recent hearing, Respondent provided no evidence as to his motion for child support filed on March 17, 1999, nor any evidence on other motions filed on that date. The Domestic Commissioner finds that the motions filed by Respondent on March 17, 1999 shall be denied.

4. On June 29, 1999, petitioner filed her motion requesting an increase in child support petitioner presented her 1999 income tax return which showed a total gross income of $36,382.00. The Domestic Commissioner finds that for 1999 petitioner had an average gross monthly income of $3,031.83. Petitioner does provide medical insurance coverage for the child, and does incur some day care. However, there was no evidence as to the day care

paid or the medical insurance coverage cost on or about June 29, 1999, and this cost will not be included in the child support calculation. In 1999, Respondent was self - employed as an attorney. Respondent's 1999 federal income tax return was introduced as Petitioner's Exhibit 9, and indicates total income of $47,428.00. $19,082.00 of this income was some form of gain from installment sales, which was not explained by Respondent. K.R.S. 403.212(2)(b) requires gross income to include income from any source, including capital gains. The Domestic Commissioner finds that it is appropriate to include all of Respondent's income for 1999 in the child support calculation. Based upon Respondent's total income of $47,428.00 for 1999, the Domestic Commissioner finds that Respondent has an average gross monthly income of $3,952.33.

5. Respondent argues that he does have the child half of the time, and therefore an adjustment in child support payment should occur. The Domestic Commissioner has reviewed the custodial schedule of both parents, and finds that petitioner has her son slightly more than one-half of the time. Based upon this nearly equal division of custodial time, the Domestic Commissioner

finds that petitioner should pay child support to Respondent in the amount of $366.30 per month, and Respondent should pay child support to Petitioner in the amount of $477.70 per month. Giving Respondent credit against his obligation for Petitioner's obligation, Respondent should pay child support to petitioner in the amount of $111.40 per month effective June 29, 1999. While each party has custody of Eric, that parent shall be responsible for any day care expense necessary and has food and other necessary items. The new amount of child support of $111.40 per month is greater than a 15% change from the current amount of child support of $280.72 per month, and is thus presumed to be a material change in circumstances that has not been rebutted.

6. On April 25, 2001, petitioner filed her motion for an increase in child support. Petitioner presented her 2001 income tax return (see Petitioner's Exhibit 21), with a total income of $38,090.00. Based upon this income for 2001, the Domestic Commissioner finds that petitioner has an average gross monthly income of $3,174.17. No cost for medical insurance coverage was provided for 2001.

7. Respondent's income for 2001 was $222,977.00. Respondent had capital gain income in 2001

resulting from the sale of real estate. For the year 2001, the Domestic Commissioner finds that Respondent has an average gross monthly income of $18,581.42. Respondent's income for the years 2000, 2001 and 2002 substantially increased due to the sale of real estate and the payment to Respondent of $211,000.00 in each of those three years. K.R.S. 403.212(b) requires gross income to include income from any source including capital gain. In the case of Clary v. Clary, 54 S.W.3d 568 (Ky. App., 2001), the Court of Appeals stated that lump sum capital gain was included in gross income in the year it was received for purposes of calculating child support under the guidelines. The Court stated that the trial court could mitigate any unfairness by deviating from the guidelines. In the present case, Respondent has greatly benefited from the sale of this real estate and has increased income as a result, which has enabled Respondent to enjoy a higher standard of living. The Domestic Commissioner cannot find any reason why his son, Eric, should not also enjoy that better standard of living.

The Domestic Commissioner finds that it is fair and appropriate to include Respondent's capital gain income in

his total income for child support calculation purposes. As shown on the attached child support worksheet, the combined monthly adjusted gross income is $21,755.59, which exceeds the income on the child support guidelines of $15,000.00. Petitioner has provided no evidence to indicate that she has expenses for this child in excess of the $1,225.00 as shown on the guidelines. Therefore, the base child support as shown on the guidelines of $1,225.00 should be used in this calculation.

8. Based upon the above income findings, and considering that Petitioner and Respondent have a nearly equal division of the custodial time for Eric Bjelland, the Domestic Commissioner finds that effective on April 25, 2001, Petitioner should pay child support to Respondent in the amount of $178.85 per month, and Respondent should pay child support to Petitioner in the amount of $1,046.15 per month. Crediting Petitioner's obligation against Respondent's obligation, Respondent should pay child support to Petitioner in the amount of $867.30 per month, which may be paid at the rate of $200.15 per week.

9. On April 13, 2001, Petitioner filed her motion requesting that Respondent be found in contempt of court for failing to pay the children support arrearage, and

for attorney fees. On April 25, 2001, Petitioner filed her motion requesting that Respondent be held in contempt for failing to pay child support and for attorney fees. There was no evidence presented at the hearing on these motions except Petitioner's testimony that all of the child support payments were made through the Campbell County Child Support Office, as shown on her Exhibit 16, with the exception of one payment of $324.70 made in 1999 that is not on that record.

10. Pursuant to the Order entered by this Court on April 23, 1999, Respondent was found to owe a child support arrearage to Petitioner in the amount of $2,570.46 as of August 26, 1998. From August 26, 1998 through April 20, 2001, the week ending prior to Petitioner's motion to hold Respondent in contempt filed on April 25, 2001, Respondent's total child support obligation for this 138 week period was $8,939.64. During this same period of time, as shown on Petitioner's Exhibit 16, Respondent has paid a total of $7,432.79, plus $324.70 not on that payment record, leaving an arrearage for this period of time of $1,182.15.

11. Pursuant to the Order entered on April 23, 1999, Respondent owed a child support arrearage of

$2,570.46 through August 26, 1998, and was ordered to pay $25.00 per week on that arrearage until it was paid in full. As shown on Petitioner's Exhibit 16, Respondent did not pay the $25.00 per week, and in February, 2000, reduced his child support payment to $182.39 per month. The Domestic Commissioner has reviewed the record and can find no basis for Respondent's reduction of his child support obligation. It is clear that Respondent has ignored the Order of this Court regarding payment of the child support amount, and as a result, the arrearage as previously found has not been paid, and has in fact increased. The Domestic Commissioner finds that Respondent is in contempt of the Order of this Court and should serve thirty (30) days in the Campbell County Detention Center for this contempt. Respondent offered no explanation as to why he was not paid his child support as ordered. Respondent may purge himself of contempt by paying the regular child support payment each and every week on time. Should Respondent fail to pay his child support each and every week, then Respondent shall serve thirty (30) days in the Campbell County Detention Center. Due to the previous modification of child support in this Report, no attempt to determine a present arrearage will be made at this time. The

parties should attempt to determine the child support arrearage, and if unable may request a hearing with his Court.

12. Petitioner has requested in two of her motions for attorney fees for Respondent's contempt. It is clear that Respondent is in contempt and Petitioner was required to file motions to enforce the Orders of this Court. Based upon the finding of contempt, and considering the financial resources of the parties, the Domestic Commissioner finds that an attorney fee of $1,000.00 should be assessed to Respondent to be paid to Petitioner's attorney within thirty (30) days of the confirmation of this Report.

13. On March 22, 2002, Respondent filed his motion requesting the right of first refusal. At that hearing, the parties did agree to the right of first refusal. This will be recited in the Recommendations of this Report.

14. On January 2, 2002, Respondent filed his motion requesting that Petitioner be found in contempt for not abiding by the custody schedule, alleging that he did not have custody of Eric Bjelland from December 27, 2001 through December 31, 2001. Petitioner acknowledged that Respondent did not have custody from December 27

through December 31. Petitioner explained that she sent a letter to Respondent regarding making up summer vacation that she did not receive and took those days, that she had requested vacation time in August, 2001 and Respondent ignored this request 80 she took the days in December. The Domestic Commissioner finds that petitioner did ignore the Order of this Court and is in contempt. No sanctions shall be imposed on Petitioner's contempt since there have been no other alleged violations, and on the condition that Petitioner comply in the future. Petitioner is advised that the custodial arrangement as ordered by this Court is expected to be followed by both parties and any future violation will be dealt with by sanctions. Respondent has also filed a motion for attorney fees. The Domestic Commissioner finds that this motion should be denied.

15. On June 13, 2001, Respondent filed a motion requesting that Petitioner be found in contempt when Petitioner removed Eric Bjelland from the Little Red School House and removed him from the State of Kentucky, and for attorney fees. Petitioner explained that she sent an e-mail to Respondent regarding a vacation week, and that Respondent gave Petitioner a letter requesting the same week in August, stating that he never

did receive the e-mail. Petitioner took vacation from June 1 through June 9, 2001 and claims she gave Respondent thirty (30) days notice. It was clear from the testimony of both parties that there was a lack of communication and understanding regarding this vacation period. The Domestic Commissioner finds that petitioner did not deliberately disregard the order of this Court regarding Respondent's custody time, and that there is fault on both parties for not clearly communicating to each other regarding Petitioner's vacation week. The parties must learn to clearly communicate with each other, to respond to each other's requests, and if they fail to do so, then these episodes will continue to occur. This motion should be denied.

16. On March 22, 2002 Respondent filed his motion requesting an order for Petitioner to cooperate with Respondent in enrolling Eric Bjelland in kindergarten at Little Red School House, or in the alternative for the Court to appoint Dr. Ed Connor to assist the Court in determining the best interest of Eric regarding his education. On May 14, 2002, petitioner filed her motion requesting permission to enroll Eric in the Ft. Thomas school system.

17. The issue before the Court is that Petitioner wants Eric to attend Moyer Elementary in Ft. Thomas, Kentucky, in the school district that she resides, and Respondent wants Eric to attend St. Pius Elementary, a private school in Edgewood in the area where he resides.

18. Petitioner presented the testimony of Daniel Hamilton, Principal at Moyer Elementary. Mr. Hamilton testified that two of Petitioner's children have attended Moyer, that the Ft. Thomas School system is the number one district for test scores, and that Moyer Elementary is in the top ten of all elementary schools. Mr. Hamilton acknowledged that St. Puis Elementary is a Blue Ribbon School, but Moyer Elementary has never applied for that. Mr. Hamilton testified that 80% of Moyer teachers have master's degrees, with an average of 13 years experience.

19. Respondent testified that he enrolled in Eric in the Little Red School House in Taylor Mill for kindergarten. He wants Eric to be enrolled in St. Pius Elementary or Blessed Sacrament Elementary in first grade. Respondent is willing to pay the tuition of approximately $2,600.00 per year for Eric to attend St. Pius in Edgewood.

20. Having heard the testimony of the parties and Petitioner's witness, the Domestic Commissioner finds

that it is in the best interest of Eric Bjelland that he attend Moyer Elementary School in Ft. Thomas, Kentucky in the first grade, and continue to attend school in the Ft. Thomas School District until further Order of this Court. Eric has resided in Ft. Thomas with Petitioner during his lifetime, with his other siblings, who also attend the Ft. Thomas School System. The Domestic Commissioner finds that it is in Eric's best interest that he continue in the same school system as his siblings.

21. The Domestic Commissioner finds that it is not necessary for Dr. Ed Connor to determine what is the best school for Eric to attend, so this motion should be denied.

22. Based upon the holding of a pre-trial conference on August 7, 2001, holding a pre-trial conference on July 9, 2002, preparing a Report on August 10, 2002, reviewing the file, reviewing all motions filed, holding a hearing in this matter on August 20, 2002, and preparing this Report regarding numerous issues and motions, the Domestic Commissioner has expended a total of 18:40 and a fee of $1,120.00 should be assessed to Petitioner and Respondent. Based upon the financial resources of the parties, the Domestic Commissioner finds

that Petitioner should pay $220.00 and Respondent should pay $900.00 of this fee. Pursuant to Part IV. Fees of Commissioners of the Circuit Court, Section 4, as contained in the Administrative Procedures of the Court of Justice, the Domestic Commissioner requests that the Circuit Judge recommend to the Chief Justice for approval of this fee for extraordinary circumstances. The extraordinary circumstances are that these parties have continued through the history of this case to file a substantial number of motions, requesting numerous hearings before the Domestic Commissioner, and the fees have exceeded $600.00. It being the desire of these parties to have numerous hearings on numerous motions and issues, this is an extraordinary circumstance, and the parties should be responsible for the payment of the time involved by the Domestic Commissioner in hearing their numerous motions.

CONCLUSIONS OF LAW

It is concluded as a matter of law that all parties are before this Court in personam; that this Court has jurisdiction of the subject matter; and, venue is proper.

RECOMMENDATIONS

1. The Domestic Commissioner recommends that the motions filed by Respondent on March 17, 1999 requesting child support from Petitioner and an order for expenses shall be denied.

2. The Domestic Commissioner recommends that effective on June 29, 1999, Respondent shall pay child support to Petitioner in the amount of $111.40 per month. While Eric Bjelland is in the custody of each parent, that parent shall be responsible for any day care expense incurred for Eric, and shall be responsible for food and other necessary items for Eric.

3. The Domestic Commissioner recommends that effective on April 25, 2001, Respondent shall pay child support to Petitioner in the amount of $200.15 per week for Eric Bjelland.

4. The Domestic Commissioner recommends that Respondent does owe a child support arrearage to Petitioner in the amount of $1,182.15 from August 26, 1998 through the week ending April 20, 2001. Respondent shall pay his total child support arrearage in full to Petitioner, within thirty (30) days of the confirmation of this Report.

5. The Domestic Commissioner recommends that Respondent is found to be in contempt of the Order of this Court for failing to pay child support as previously ordered, resulting in a child support arrearage owing to Petitioner. As a result of this contempt, Respondent shall serve thirty (30) days in the Campbell County Detention Center. Respondent may purge himself of this contempt by paying his child support as ordered by this Court on a weekly basis, on time. Failure of Respondent to pay his child support on a regular weekly basis shall result in Respondent serving thirty (30) days in the Campbell County Detention Center for his contempt

6. The Domestic Commissioner recommends that Petitioner's motions for attorney fees to be assessed against Respondent shall be sustained, and Respondent shall be assessed the sum of $1,000.00 to be paid to Petitioner's attorney within thirty (30) days of the confirmation of this Report.

7. By agreement of Petitioner and Respondent, the Domestic Commissioner recommends that Petitioner and Respondent shall each be granted the right of first refusal to provide care for Eric Bjelland when the parent with custody is unable to provide that care for Eric for a

period of more than four hours. This right of first refusal shall not apply on Monday through Friday from 8:00 A.M. until 5:30 P.M. At other times, whenever the parent with custody is unable to provide personal care for Eric Bjelland for a period in excess of 4 hours, then that parent shall give the other parent the option to provide care for Eric Bjelland. The parent with custody will then drop off Eric to the other parent, and that parent would then return Eric at the agreed upon time.

8. The Domestic Commissioner recommends that Respondent's motion to hold petitioner in contempt for failing to abide by the custodial schedule and denying him custody of Eric Bjelland from December 27 through December 31, 2001 shall be sustained, and Petitioner is found in contempt for violating the custody order of this Court. No sanctions shall be imposed on Petitioner at this time on the condition that Petitioner comply with the custody order issued by this Court in the future. Respondent's motion for attorney fees shall be denied.

9. The Domestic Commissioner recommends that Respondent's motion filed on June 13, 2001 to hold Petitioner in contempt and for attorney fees shall be denied.

10. The Domestic Commissioner recommends that for the school year 2003-2004, when Eric Bjelland will enter the first grade, Eric Bjelland shall attend Ruth Moyer Elementary School in the Ft. Thomas School District, and shall continue to attend school in the Ft. Thomas School District until further order of this Court.

11. The Domestic Commissioner recommends that Respondent's motion to refer this matter to Dr. Ed Connor to determine the best interest regarding Eric Bjelland's education shall be denied.

12. The Domestic Commissioner recommends that a fee of $1,120.00 be assessed to Petitioner and Respondent for the hearing, Report and other related requirements. Petitioner shall pay $220.00 and Respondent shall pay $900.00 of this fee. Upon confirmation of this Recommendation, the Circuit Judge does recommend to the Chief Justice that this fee be assessed to these parties.

Respectfully submitted:

/s/ J. Robert Jennings
J. Robert Jennings
Domestic Commissioner

CC: Hon. Bernard Blau
Carl Knochelmann, Respondent

CASE NAME: Bjelland v. Knochelmann
FILE NUMBER: 97-CI-00860
Effective June 29, 1999 COUNTY: Campbell

COMMONWEALTH OF KENTUCKY
WORKSHEET FOR MONTHLY
CHILD SUPPORT OBLIGATION

	A. Custodial Parent	B. Non Custodial Parent	C. Both Parents
1. Monthly gross income	$3,031.83	$3,952.33	
2. Deduction for maintenance payments	$ -	$ -	
3. Deduction for other child support for prior-born child(ren)	$ -	$ -	
4. Adjusted monthly income	$3,031.83	$3,952.33	
5. Combined monthly adjusted parental gross income			$6,984.16

6. Percentage of combined monthly adjusted parental gross income	43.4%	56.6%	
7. Base monthly support			$844.00
8. Additional child care costs			$-0-
9. Chid(ren)'s health insurance premium cost			$-0-
10. Total child support obligation			$844.00
11. Each parent's obligation	$366.30	$477.70	
12. Deduction for child care or health insurance premiums paid by NCP		$-0-	
13. Presumed monthly child support obligation		$477.70	

$477.70 Respondent
$366.30 Petitioner
$111.40 CS-71 (CS-7/00)

CASE NAME: Bjelland v. Knochelmann
FILE NUMBER: 97-CI-00860
COUNTY: Campbell

COMMONWEALTH OF KENTUCKY
WORKSHEET FOR MONTHLY
CHILD SUPPORT OBLIGATION

	A. Custodial Parent	B. Non Custodial Parent	C. Both Parents
1. Monthly gross income	$3,174.17	$18,581.42	
2. Deduction for maintenance payments	$ -	$ -	
3. Deduction for other child support for prior-born child(ren)	$ -	$ -	
4. Adjusted monthly income	$3,174.17	$18,581.42	
5. Combined monthly adjusted parental gross income			$21,755.59

6. Percentage of combined monthly adjusted parental gross income	14.6%	85.4%	
7. Base monthly support			$1,225.00
8. Additional child care costs			$-0-
9. Chid(ren)'s health insurance premium cost			$-0-
10. Total child support obligation			$1,225.00
11. Each parent's obligation	$178.85	$1,046.15	
12. Deduction for child care or health insurance premiums paid by NCP		$-0-	

13. Presumed monthly child support obligation		$1,046.15	

$1,046.15 Respondent
$178.85 Petitioner
$867.30 = $200.15 per week

CS-71 (CS-7/00)

COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
FIRST DIVISION
CASE NO. 97-CI-00860

IN RE: THE CUSTODY AND SUPPORT OF

THE MINOR CHILD OF:

MARY E. BJELLAND **PETITIONER**

FILED
Sep. 17, 1999
Campbell County, KY, Circuit Court, Clerk

AND

CARL E. KNOCHELMANN **RESPONDENT**

NOTICE OF RESERVATION

Now comes the Respondent, Carl E. Knochelmann, and hereby notifies this Court of the reservation of Federal Jurisdiction over the Federal Constitutional issues pending in this matter.

Respondent files this reservation pursuant to the authority in Government & Civic Employees Organizing Comm., CIO v. Windsor, 353 U.S. 364, 366-67 (1957). Plaintiff further references the authority in England v. Medical Examiners, 375 U.S. 411 (1963) and Gottfried v. Medical Planning Services, Inc., Electronic Citation: 1998 FED App. 0113P (6th Cir.).

Respectfully submitted,

/s/ Carl E. Knochelmann Jr.
Carl E. Knochelmann Jr.
Respondent
3032 Belle Meade Lane
Edgewood, Ky. 41017
(606) 581-2822

CERTIFICATION

I hereby certify that a true copy of the foregoing was mailed to Jan Kipp Kreutzer, attorney for Petitioner, at 31 E. Fourth Street, Newport, Ky. 41071 on this the 17th day of September, 1999.

/s/ Carl E. Knochelmann Jr.
Carl E. Knochelmann Jr.